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No. 82-____

IN THE

Supreme Court of the United States

October Term, 1982

SUMMA CORPORATION,
Petitioner,

v.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

In keeping with the United States' commitment under the Treaty of Guadalupe Hidalgo that the property rights of former Mexican citizens "shall be inviolably respected," Congress passed the Act of March 3, 1851 "to ascertain and settle the private Land Claims in the State of California." The validity of an 1839 Mexican grant to petitioner's predecessors was confirmed under the 1851 Act, and a federal patent issued without qualification or reservation. The court below, however, held that upon its admission to the Union, California had obtained from the United States an expansive "public trust" property interest precluding virtually all uses by petitioner of the shallow wetlands involved. In these circumstances, the questions presented are:

1. Whether, when the federal government pursuant to its treaty obligation confirmed a Mexican land grant and patented the land to private parties without qualification, the United States silently reserved a "public trust" property interest, to which the State of California succeeded.

2. Whether the State of California may collaterally attack a factual determination in an 1851 Act patent proceeding that the Mexican grant land was not tidelands.[1]

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[1] In the California Supreme Court, this case was entitled *City of Los Angeles v. Venice Peninsula Properties.* The suit was instituted by the City of Los Angeles against Ethel Fraser Carmen-Ryles; Robert D. Byrne and Byrne C. Manson, as Trustees under the Will of Olive Byrne Jones, Deceased; Fraser's Million Dollar Pier Company; United California Bank, as Trustee under the Will of Herbert Richmond Gage; Ruth Jones Wright; Hughes Tool Company (now Summa Corporation); the State of California and one thousand Doe defendants. Southern California Gas Company was added as defendant Doe 1. Venice Peninsula Properties succeeded to the interests of Ethel Fraser Carmen-Ryles, Fraser's Million Dollar Pier Company and United California Bank and was substituted as the first-named defendant below. The State of California was named as a defendant because of a provision of California law that makes the State a necessary party to any action by or against a city involving "the title to or boundary of tidelands." Calif. Pub. Res. Code § 6308.

The City claimed to be the present owner of a "public trust" easement in petitioner's property. The State supported the City's claim, and filed a cross-complaint against the other defendants alleging that the State had owned a "public trust" interest in the property in question, which it had granted to the City. All of the defendants except Southern California Gas Company stipulated to be bound by the outcome of the litigation between the City of Los Angeles and the State of California and Summa Corporation. As a result, they did not actively participate in the proceedings below. Southern California Gas Company, the owner of a pipeline easement across petitioner's land, no longer has an interest in the outcome of this proceeding because of the concession by respondents that the company would have to be compensated for any damage to its facilities.

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STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner Summa Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of California entered in this proceeding.

OPINIONS BELOW

The findings of fact and conclusions of law of the state trial court, entered on February 22, 1977, and the judgment it entered on October 11, 1977, are unreported. The opinion of the state Court of Appeal (and dissent), reversing the trial court, is reported at 172 Cal. Rptr. 619 (1981). That opinion was superseded when the California Supreme Court granted a hearing, and was not published in the official report. *See* Calif. Rules of Court, Rule 976(d) (1972). The opinion of the state supreme court (and dissents), affirming the trial court, is reported at 31 Cal. 3d 288, 182 Cal. Rptr. 599, 644 P.2d 792 (1982). All of these opinions and orders are reproduced in the Appendix hereto.

JURISDICTION

The opinion of the California Supreme Court was entered on May 10, 1982. A timely petition for rehearing was filed, and was denied on June 16, 1982. On August 26, 1982, Mr. Justice Rehnquist extended petitioner's time to file a petition for a writ of certiorari until October 22, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

TREATY AND STATUTE INVOLVED

Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848).

Act of March 3, 1851 "to ascertain and settle the private Land Claims in the State of California," 9 Stat. 631 (1851).

The Treaty and Act are set forth in Appendix B-1 and Appendix B-2, respectively.

STATEMENT

This case presents fundamental issues concerning the respective property interests of the State of California and petitioner in shallow wetlands conveyed to petitioner's predecessors by Mexico prior to the cession of California to the United States. Title to this land was confirmed in and patented to the Mexican grantees by the United States pursuant to the Treaty of Guadalupe Hidalgo (9 Stat. 922 [1848]) and the Act of March 3, 1851 "to ascertain and settle the private Land Claims in the State of California." 9 Stat. 631 (1851). At issue is whether under the Equal Footing Doctrine, California on statehood obtained from the United States a "public trust" property interest in this land.

In the decision below, the California Supreme Court determined that despite Mexico's grant and the United States' unqualified confirmation of full title in petitioner's predecessors, both Mexico and the United States had silently reserved a "public trust" interest which passed to California on statehood. Under California law, the "public trust" interest decreed is so extensive as virtually to usurp petitioner's underlying title. For example, the "public trust" interest supports a requirement that even dry land be perpetually preserved as open space. *See Marks*

v. Whitney, 6 Cal. 3d 251, 259-261, 98 Cal. Rptr. 790, 796-797, 491 P.2d 374, 380-381 (1971). (*See also* p. 6, *infra*.)

Confirmed Mexican grants form the basis of title to much of the land in California. Following the line of the Spanish missions stretching from San Diego to Sonoma, most of the land along the Pacific coast is located within former Mexican ranchos or pueblos. While the Mexican grants of these properties regularly excluded the ocean beaches, they often included minor sloughs, lagoons, and shallow pools lying inland from the ocean shore. These lands, many of which have been filled and subdivided, constitute some of the most valuable real estate in California.

The present decision clouds the title to these extensive properties. In reaching its result, the California Supreme Court failed to follow repeated decisions of this Court which hold that California, upon admission to the Union, obtained no property interest under the Equal Footing Doctrine in lands within Mexican grants confirmed pursuant to the Treaty of Guadalupe Hidalgo. That fundamental error, together with its importance to the property holdings potentially involved, merit the attention of this Court.

A. The Property In Dispute And The Origin Of Petitioner's Title.

The land in issue is part of a very shallow and narrow body of water, known as Ballona Lagoon, which lies generally parallel to and approximately 300 yards inland from the shore of the Pacific Ocean. (Exh. 74.)[2] As a result of earlier condemnations, Ballona Lagoon is bisected both by a flood control channel and by a dredged entry channel connecting the nearby Marina del Rey yacht harbor with the Pacific Ocean. (Exhs. E & G; R.T. 850-877.) These projects have left a very small pond or lagoon remnant on one side and a somewhat larger one on the other.

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[2] "C.T." refers to the Clerk's Transcript on appeal in the state court. "R.T." refers to the Reporter's Transcript of the trial proceedings. "Exh." refers to the exhibits introduced into evidence at trial. "App." refers to the Appendix hereto.

The latter, which constitutes the property in issue,[3] was placed in flowage communication with the Marina del Rey entry channel as a part of the construction of that project. The communication takes place by means of a pipe which connects to a motorized tide gate. (C.T. 564, 778, 796.) The lagoon remnant is approximately 1500 yards long, 25 yards wide, and at mean high tide the water is one to six feet deep.[4] (R.T. 628-630; Exhs. 66 & 74.) At low tide it is virtually dry. (R.T. 662.)

Petitioner's title is derived from an 1839 Mexican grant of "Rancho La Ballona." On Mexico's cession of California to the United States in 1848, the United States agreed in the Treaty of Guadalupe Hidalgo that the property rights of Mexicans in the newly-acquired territory "shall be inviolably respected." 9 Stat. 922, 929, Art. VIII (1848). In accordance with the treaty obligation, Congress in 1851 passed "An Act to ascertain and settle the private Land Claims in the State of California." 9 Stat. 631 (1851).

The Mexican grantees of Rancho La Ballona filed a petition for confirmation of their title under the 1851 Act. After hearing, the petition was granted by the Board of Land Commissioners in 1854 and affirmed by the United States District Court on appeal in 1855. (Exh. A, pp. 36-37, 49-53.) In accordance with the further procedures established by the 1851 Act, a survey of the confirmed claim was thereupon prepared, approved by the

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[3] Petitioner owns one of the two lots which together constitute this remnant. The owners of the second lot were also named as defendants below, but by stipulation agreed to be bound by the outcome of the litigation against petitioner. *See* note 1, *supra*. *See also* App. A-6, p. A-67.

[4] Although the trial court found that at high tide the waters within the lagoon are navigable by "rowboats, canoes, surfboards and other shallow-draft craft" (App. A-5, p. A-52), it was admitted at trial (C.T. 986) that the waters are not navigable in commerce, which is the federal test of navigability for Equal Footing purposes, *United States v. Oregon*, 295 U.S. 1, 14-15 (1935), and that they are not navigable in interstate commerce, which is the federal test of navigability for the Commerce Clause servitude. *Kaiser Aetna v. United States*, 444 U.S. 164, 178-179 (1979).

Surveyor General of California, and submitted to the General Land Office for the issuance of a patent. (*Id.*, pp. 62-66.)

The survey submitted established the shore of the Pacific Ocean as the southerly boundary of the Rancho.[5] (App. C-2.) The General Land Office, however, declined to approve the survey, noting that it contained an area just inland from the ocean which was labeled "inner bay." It remanded the survey to the United States Surveyor General with directions that, "unless good cause be shown to the contrary," the survey be amended to substitute the shore of the "inner bay" for the ocean boundary. (App. D-1.)

In the proceedings that followed, the Mexican grantees presented affidavits that the "inner bay" was not an "arm of the sea" but rather land intermittently overflowed with fresh water in times of storms when sand blocked an adjacent creek's outlet to the ocean. (Exh. A, pp. 438, 442, 446.) Based on this submission, as well as the survey field notes and the underlying Mexican *diseño* (map), the General Land Office ultimately determined that the "inner bay" was not an arm of the sea and withdrew its earlier objection to the survey's ocean boundary. (App. D-2, pp. A-136, A-138.) The survey was thereafter approved by the Secretary of the Interior and a patent issued confirming title to the "inner bay" in the Mexican grantees. (Exh. A, pp. 518-520; App. C-1.)

"Ballona Lagoon" in its present configuration was treated by the California courts as the remnant of the larger "inner bay" depicted on the United States patent survey. The courts further concluded that the lagoon is a tidal "arm of the Pacific Ocean" which has continually existed as such for more than 900 years. (App. A-5, p. A-52; App. A-1, p. A-7 & note 6.)

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[5] The compass direction of the Pacific shore at the point in question is actually southwest, but the General Land Office regularly referred to the ocean as lying to the south.

B. The "Public Trust" Doctrine In California Law.

On California's admission to the Union, the United States' title to all California tidelands not subject to prior Mexican grant passed to the State as "absolute property" under the Equal Footing Doctrine. *Weber v. Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57, 65-66 (1873). *See also Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). However, California determined early on that her title to such property was held in trust for the people of the State for purposes of commerce, navigation and fishing. *See Eldridge v. Cowell*, 4 Cal. 80, 87-88 (1854).

During the early years of statehood, the California legislature enacted a number of statutes providing for extensive sale of publicly owned tidelands. In *People v. California Fish Co.*, 166 Cal. 576, 138 P. 79 (1913), the California Supreme Court considered the effect of certain statutes which authorized tideland sales without regard to any trust purpose. *Id.* at 590, 138 P. at 85. Although asked to declare such sales void, the court held instead that they conveyed a fee which did not represent "the entire title." *Id.* at 589, 138 P. at 84. It determined that the State had impliedly reserved a "public trust" interest by which the State retained the right "to enter upon and possess" the land and to make "changes and improvements" for "the preservation and advancement of trust uses." *Id.* at 588-589, 138 P. at 84. The property interest so reserved has been said to persist despite the land's lawful reclamation,[6] and the "trust uses" for which the State may "possess" the land include "preservation" so that it may serve as "open space" and "favorably affect the scenery" of the area.[7] *Marks v. Whitney*, 6 Cal. 3d 251, 259-261, 98 Cal. Rptr. 790, 796-797, 491 P.2d 374, 380-381 (1971).

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[6] The "public trust" interest is distinct from the easement to traverse and fish navigable waters. The latter follows navigable water without regard to any property interest in the submerged land and automatically terminates on reclamation. *See Bohn v. Albertson*, 107 Cal. App. 2d 738, 757, 238 P.2d 128, 140 (1951).

[7] Approved "public trust" uses include the construction of a YMCA building, *People v. City of Long Beach*, 51 Cal. 2d 875, 338 P.2d 177

C. Proceedings Below, Parties, And Jurisdictional Matters.

This action was commenced in the Los Angeles County Superior Court on September 13, 1965 when the City of Los Angeles filed a Complaint for Declaratory Relief and to Quiet Title to two parcels of land which together constitute the larger remnant of "Ballona Lagoon." (C.T. 1-14.) Named as defendants were all of the individuals and entities which had an interest of record in either of the parcels.[8]

The City alleged that it was the owner of a "public trust" interest in the subject property. It claimed to be the grantee of the State of California,[9] which allegedly received the interest on statehood "by virtue of its sovereignty." (C.T. 4.) The State subsequently filed a cross-complaint supporting and reiterating the City's allegations. (C.T. 115-120.)

At the time of filing its Complaint, the City sought to establish its "public trust" interest in order to avoid paying just compensation for dredging the property as a part of the then-contemplated construction of a small craft waterway system in the adjacent Venice Canals.[10] (C.T. 5.) However, by the time of

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(1959), and drilling for oil. *Boone v. Kingsbury*, 206 Cal. 148, 273 P. 797 (1928). "In administering the trust the state is not burdened with an out-moded classification favoring one mode of utilization over another." *Marks v. Whitney*, 6 Cal. 3d 251, 260-261, 98 Cal. Rptr. 790, 796, 491 P.2d 374, 380 (1971).

[8] These parties are identified in note 1, *supra*.

[9] By Chapter 77, Statutes of California, 1917, all interest held by the State of California, by virtue of its sovereignty, in tidelands within the boundaries of the City of Venice, a predecessor of the City of Los Angeles, was granted to the City. The statute, however, contains the express proviso "that nothing contained herein shall in any way affect any property held or claimed under, through or from a Mexican grant or patent therefor . . . ." This proviso reflected the common understanding that areas within Mexican grants were excluded from property received by California upon its admission to the Union.

[10] The Venice Canals are an interconnected series of narrow, shallow waterways which were constructed over 80 years ago as part of the

trial almost 10 years later, that project had been abandoned. Accordingly, the purpose of the "public trust" decree sought by the City was to establish public access to the land and to require its preservation as open space. (C.T. 448, 796.)

Following a bench trial, the trial court filed findings of fact which found that the property had been a tidal "arm of the Pacific Ocean" at all relevant times, and that under Mexican law the original grantees had not obtained any property interest in the land. (App. A-5, pp. A-52, A-54.) Although the trial court found that title to the property had been confirmed in petitioner's predecessors under the Act of 1851 (*id.*, p. A-58), it entered judgment on October 11, 1977 decreeing the land subject to a "trust" easement held by the State of California "for the People of the State."[11] (App. A-6, p. A-68.)

On petitioner's appeal, the judgment was reversed by the California Court of Appeal on March 25, 1981. (App. A-4.) With one judge dissenting, the Court of Appeal found that the "public trust doctrine" was applicable only to those lands to which California had once held title. (*Id.*, p. A-40.) Relying on the decisions of this Court, it held that California had not, on statehood, succeeded to any property interest in lands subject to previous Mexican grants, and that the federal patent issued to petitioner's predecessors was conclusive of California's claim. (*Id.*, pp. A-42–A-44.)

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private subdivision of lands northwest of Ballona Lagoon. (Exh. N-7.) Many of the canals have been filled, and those that remain have deteriorated to the point where they represent a health and safety problem. (Exhs. N-2, N-3, N-14.)

[11] The trial court judgment also awarded the City several easements under various state law theories of express and implied dedication. (App. A-6, pp. A-68 - A-69.) The California Supreme Court did not reach that part of the judgment, finding the uses which such easements supported "included within the public trust." (App. A-1, p. A-16.) Since the California Supreme Court decided the case on federal grounds, this Court has jurisdiction without regard to any state grounds which were not reached. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 98 (1938).

The California Supreme Court granted a hearing in the case on May 21, 1981. By a decision filed on May 10, 1982, it affirmed the trial court's "public trust" decree. (App. A-1.) It reached this result by holding that Mexico had impliedly reserved a "public trust" interest in the property (App. A-1, pp. A-8–A-9), that such interest had passed to the United States on Mexico's cession of California (*id.*, p. A-9), that the United States had silently reserved that interest from its 1851 Act patent (*id.*, p. A-15), and that on admission to the Union, California succeeded to the reserved interest as an incident of sovereignty. (*Id.*) Two justices filed separate dissents from the four-person majority opinion. (App. A-1, pp. A-16–A-30, A-30–A-32.) The court denied petitioner's request for rehearing on June 16, 1981. (App. A-2.)

D. Federal Questions Raised And Decided Below.

The decision of the California Supreme Court is based on the determination of a number of controlling questions of federal law. First, whether a property interest in the land passed from the United States to California under the Equal Footing Doctrine is a federal question. *United States v. Holt Bank*, 270 U.S. 49, 54-56 (1926). *See also Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 22 (1935). The California Supreme Court expressly determined "that the federal government retained an interest in the tidelands in question when it issued the patent to defendants' predecessors, and that this interest was acquired by California upon its admission to statehood." (App. A-1, p. A-15.) The assertion that such a property interest did pass to the State is central to the respondents' claim and was raised in both the City's complaint (C.T. 4) and the State's cross-complaint. (C.T. 117.)

Second, both the trial court and the California Supreme Court rejected petitioner's contention that California's property interest claim is in contravention of the United States' patent issued to petitioner's predecessors in interest, and is foreclosed by the State's failure to present its claim in the course of the 1851 Act proceedings. (App. A-5, p. A-59; App. A-1, pp. A-11–A-15.) These asserted rights arise under federal law and their rejection involves the determination of a federal question. *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375 (1977);

Knight v. United States Land Association, 142 U.S. 161, 183-184 (1891). Petitioner raised these claims of federal right in its pretrial memorandum of law (C.T. 57-76), and maintained its position throughout the appeal.

Third, petitioner asserted throughout the trial and appeal that the determination of the United States General Land Office as to the then non-tidal character of the subject land is conclusive. (C.T. 64-67, 612-618.) Whether a factual determination made by the Land Office in the course of a patent proceeding is open to collateral attack is a federal question. *De Cambra v. Rogers,* 189 U.S. 119, 122 (1903). Accordingly, the California Supreme Court's holding that the Land Office's determination was not conclusive (App. A-1, p. A-7) constitutes an interpretation of federal law.

REASONS FOR GRANTING THE WRIT

For the first time, the California Supreme Court has held that the State owns an expansive and permanent "public trust" property interest in wetlands contained in Mexican land grants. The California court reached this admittedly unprecedented result notwithstanding that, pursuant to the Act of 1851, the private ownership of the land was confirmed by a federal court decree and patented by the United States without qualification or reservation and that neither California nor the United States ever had title to the land. This holding is contrary to the commitment undertaken in the Treaty of Guadalupe Hidalgo that the property rights of former Mexican citizens "shall be inviolably respected." 9 Stat. 922, 929, Art. VIII (1848).

The State's asserted "public trust" interest extinguishes fundamental aspects of private ownership. It would permit the State to "enter upon and possess" petitioner's land, to construct improvements on it, to afford public access to the land, and even to "preserve" the land in its natural state as open space without payment of compensation.[12] *Marks v. Whitney,* 6 Cal. 3d 251, 259-

[12] The scope of the State's asserted "public trust" interest is illustrated by this very case. While the City of Los Angeles initially asserted a

261, 98 Cal. Rptr. 790, 796-797, 491 P.2d 374, 380-381 (1971). (*See also* p. 6, *supra.*) In exercising its "public trust" rights, the State, not the private owner, is entitled to possession; the State, not the private owner, is entitled to develop (or not develop) the land; and the State, not the private owner, is entitled to control access. In fact, the interest left to the private owner has been characterized by the California Supreme Court itself as nothing but "the naked title to the soil." *People v. California Fish Co.,* 166 Cal. 576, 598, 138 P. 79, 88 (1913).

The state supreme court's holding that a "public trust" easement was silently reserved has far-reaching implications for the extensive Mexican grant lands along the coast of California. According to a recent study by the State Lands Commission, 512 of the 670 miles of California's coastline from Sonoma south have as their source rancho or pueblo grants confirmed by patents issued by the United States under the Act of 1851. The federal government owns over 90 miles of this coastline, which it acquired from private parties whose source of title was a Mexican land grant. California State Lands Commission, *Inventory of Ungranted Tidelands: Survey Priority Study, passim* and Appendix C (1981).

While this case does not affect California's coastal beaches, which were regularly excluded from Mexican land grants, it does affect the hundreds of sloughs, creeks and shallow pools lying inland from the shoreline, often separated from the ocean by a barrier beach, sand spit or other land mass. These wetland areas are a common feature of the California coastline, and were frequently included within Mexican grants. Under California law, such lands would be potentially affected whether they remain wetlands or have been filled and reclaimed. *See Atwood v. Hammond,* 4 Cal. 2d 31, 40-41, 48 P.2d 20, 24-25 (1935).

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right to dredge the shallow lagoon, the dredging project was abandoned by the time of trial, and the City now seeks to preserve the property as "open space." (C.T. 448, 796.)

Thus, if the California decision stands, large tracts of land confirmed and patented by the United States without qualification may now be burdened with a "public trust" easement that transfers the essential attributes of ownership to the State and precludes virtually all use of the lands by their owners.

I. THE FEDERAL CONFIRMATION AND PATENTING PROCESS PRECLUDE CALIFORNIA'S ASSERTED "PUBLIC TRUST" PROPERTY INTEREST.

In the Treaty of Guadalupe Hidalgo (9 Stat. 922 [1848]) the United States undertook a special obligation to honor and protect the property rights of Mexicans in the acquired territory. As a result, this Court has consistently held that tidelands contained within prior Mexican grants did not pass to California on its admission to the Union. *United States v. Coronado Beach Co.*, 255 U.S. 472, 487-488 (1921); *Knight v. United States Land Association*, 142 U.S. 161, 183-184 (1891). The Equal Footing Doctrine simply "does not apply to lands that had been previously granted to other parties by the former government." 142 U.S. at 183. *See also San Francisco v. LeRoy*, 138 U.S. 656, 670-671 (1891).

The mechanism that the United States established to carry out its treaty obligation that Mexican property rights "shall be inviolably respected" was the Act of March 3, 1851. 9 Stat. 631 (1851). Its purpose was to provide a procedure to determine Mexican land claims, and to confirm those found valid by issuance of a "conclusive" federal patent to serve as an "instrument of quiet and security to its possessor." *Beard v. Federy*, 70 U.S. (3 Wall.) 478, 491-493 (1866).

In carrying out its statutory duty, the Board of Land Commissioners was to be governed by "the laws, usages, and customs of the government from which the claim is derived . . . so far as they are applicable." 9 Stat. 631, 633, § 11 (1851). Thus, the question of the validity of a tidelands grant under Mexican

law was for the Commissioners to decide, and "it was a jurisdiction to decide rightly or wrongly."[13] *Thompson v. Los Angeles Farming Co.*, 180 U.S. 72, 77 (1901). *See also United States v. Coronado Beach Co.*, 255 U.S. 472, 488 (1921). Once made, that decision is conclusive and not subject to collateral attack. *Id.*

Recognizing that under this Court's controlling decisions the title of petitioner's predecessors could not be dislodged, the California court simply carved out a concurrent property interest for the State which it denominated a "public trust" easement rather than a fee. By such semantic sleight of hand, it effectively concluded that the United States patent had provided petitioner's predecessors with only "naked title to the soil,"[14] while silently reserving to California the right to "possess"[15] the land to the same extent that it possesses the tidelands which it received as "absolute property" under the Equal Footing Doctrine.[16] Thus, it is the State, and not the patent grantee, which enjoys each of the common incidents of ownership—possession, use, and control of access.[17]

But, however such "public trust" property interest is denominated, California's failure to present its claim during the

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[13] The California Supreme Court believed that tidelands were inalienable under Mexican law (*Las Siete Partidas*) and therefore assumed that if alienated, the tidelands must be subject to some sort of retained "public trust" interest. (App. A-1, p. A-9 & note 9.) However, the determination that Mexican law permitted alienation of tidelands without any retained interest in the government was one properly for the Land Office to make, and it was made consistently with the view of *Las Siete Partidas* taken by this Court in *Jover v. Insular Government*, 221 U.S. 623, 633 (1911).

[14] *See People v. California Fish Co.*, 166 Cal. 576, 598, 138 P. 79, 88 (1913).

[15] *Marks v. Whitney*, 6 Cal. 3d 251, 261, 98 Cal. Rptr. 790, 797, 491 P.2d 374, 381 (1971).

[16] *See Weber v. Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57, 65-66 (1873).

[17] Calif. Civil Code § 654 defines "ownership" of property as the right "to possess and use it to the exclusion of others."

1851 Act patent proceeding bars its belated assertion now. The 1851 Act required that "Each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same" to the Board of Land Commissioners within two years. 9 Stat. 631, 632-633, § 8 (1851). The Act did "not create a voluntary jurisdiction, that the claimant [might] seek or decline," and it "comprehended every species of title or right, whether inchoate or complete."[18] *United States v. Fossatt*, 62 U.S. (21 How.) 445, 448 (1859). And this requirement applies to state Equal Footing claims in derogation of Mexican grants just as it does to competing private claims. *Knight v. United States Land Association*, 142 U.S. 161, 184 (1891).

This Court has squarely held that failure to present a claimed interest in the patent proceedings constitutes an abandonment of the interest. *Barker v. Harvey*, 181 U.S. 481 (1901); *United States v. Title Insurance Co.*, 265 U.S. 472 (1924). *Barker* determined that the Indians' right of occupancy in Mexican grant lands was abandoned by failure to present their claim in the patent proceeding:

> "Surely a claimant would have little reason for presenting to the land commission his claim to land, and securing a confirmation of that claim, if the only result was to transfer the

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[18] The California Supreme Court expressly recognized that the State's "public trust" easement is an interest in petitioner's property. (App. A-1, pp. A-8, A-11, A-15.) It did not find that petitioner holds its fee in trust, but rather that the bundle of rights in the property is shared between petitioner and California. Thus, the language in *Townsend v. Greely*, 72 U.S. (5 Wall.) 326, 335 (1866), that "If the claim was held subject to any trust, before presentation to the Board, the trust was not discharged by the confirmation and the subsequent patent," has no application here, because there is no contention that petitioner holds its fee in trust. The fact that California was found to hold *its* interest in trust is irrelevant. The issue here is the state of the title confirmed by the United States—was it a full title in petitioner's predecessors or a title divided between them and California? Determining such competing claims was the precise purpose of the 1851 Act proceedings.

naked fee to him burdened by an Indian right of permanent occupancy." 181 U.S. at 491-492.

In *United States v. Title Insurance Co.*, 265 U.S. 472 (1924), this Court declined the government's invitation to overrule *Barker*, reaffirming that "the purpose of the Act of 1851 was to give repose to titles as well as to fulfill treaty obligations, and that it not only permitted but required all claims to be presented to the commission, and barred all from future assertion which were not presented within the two years." *Id.* at 483.

California's present claim of a right to "enter upon and possess" petitioner's land is at least as broad as the Indian claims of occupancy found barred in *Barker* and *Title Insurance*.[19] The California Supreme Court's failure to find these cases "convincing authority" (App. A-1, p. A-15) constitutes a disregard of the controlling precedents of this Court, and a failure to accord full respect to the treaty obligations of the United States.

II. THE FEDERAL PATENT DETERMINATION THAT THE LAND WAS NOT TIDELANDS IS CONCLUSIVE AND NOT SUBJECT TO COLLATERAL ATTACK.

Petitioner's land cannot be subject to a tidelands "public trust" property interest because, as part of the 1851 Act patent process, the General Land Office of the United States Department of Interior made a specific determination that the land was not tidelands.

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[19] The state court's reliance upon the Mexican grant's reservation of "the traversing roads and servitudes" (servidumbres) (App. A-1, p. A-9) is just as misplaced as was the Indians' reliance on virtually identical language. The reservation "does not mean that the general occupation and control of the property is limited by any so-called servidumbres, but only that such full control shall not be taken as allowing any interference with established roads or cross roads, or things of like nature." *Barker v. Harvey*, 181 U.S. 481, 499 (1901).

After the Mexican grantees' title to Rancho La Ballona had been confirmed by the federal district court, Henry Hancock, Deputy Surveyor of the United States, surveyed the grant in July 1858. (App. C-2.) The Hancock survey, which showed the shore of the Pacific Ocean as a Rancho boundary, was approved by the United States Surveyor General in San Francisco on September 18, 1858, and forwarded to the General Land Office in Washington, D.C. (Exh. A, pp. 62-66.) On March 17, 1860 the General Land Office declined to approve the Hancock survey, noting that it contained an area just inland from the ocean which was labeled "inner bay." It remanded the survey to the Surveyor General for reexamination with directions that, "unless good cause be shown to the contrary," the survey be amended to show the shore of the "inner bay," rather than the shore of the open ocean, as the Rancho boundary. (App. D-1.)

In the proceedings that followed remand, the grantees of Rancho La Ballona presented affidavits testifying to the character of the "inner bay." (Exh. A, pp. 438, 442, 446.) On the basis of this and further evidence, the General Land Office withdrew its earlier objection and approved the Hancock survey on April 30, 1873. With respect to the character of the "inner bay," Commissioner Willis Drummond concluded as follows:

> "The character of this estero, or inner bay as it is marked on the plat of survey, is testified to by Tomas Talamantes, Jose del C. Sepulveda and Ignacio Machado, who in substance say it is not an arm of the sea, and that much of the tract represented as inner bay is suitable for pasturage. That this estero . . . *is not an arm of the sea is evident from the field notes and plat of survey which are not contradicted by any evidence in this case*, and which show that what this office in 1860, mistook for the mouth of an estero was meandered on its southeast side to within a few chains of the ocean, and on the east of said meandered line were found high hills, *that this inner bay is not an arm of the sea* and that the mouth of this estero is wholly outside the present survey of the Ballona rancho *is also shown by an official survey of the rancho Sansal Redondo which adjoins the southern portion of the eastern boundary of Hancock's survey of Ballona.*" (App. D-2, p. A-136.)

The Secretary of the Interior thereupon approved the Hancock survey (Exh. A, pp. 518-520), and a patent thereafter issued confirming title to the "inner bay" in petitioner's predecessors. (App. C-1.)

Under the Act of 1851, the General Land Office had unquestionable jurisdiction to determine the character of the "inner bay." *Compare Knight v. United States Land Association*, 142 U.S. 161, 182-184 (1891), *with Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 16-21 (1935). Defining the character of land for purposes of patent inclusion constitutes a determination of fact. *Burke v. Southern Pacific R. R. Co.*, 234 U.S. 669, 691-692 (1914). As early as 1898 this Court was able to say:

> "[I]f there is any one thing respecting the administration of the public lands which must be considered as settled by repeated adjudications of this court, it is that the decision of the land department upon mere questions of fact is, in the absence of fraud or deceit, conclusive, and such questions cannot thereafter be relitigated in the courts." *Johnson v. Drew*, 171 U.S. 93, 99 (1898).

This rule of conclusiveness is fully applicable to findings made by the General Land Office in the course of an 1851 Act proceeding.[20] *See More v. Steinbach*, 127 U.S. 70, 83 (1888). The California court's reexamination of the 1850 character of the

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[20] Attempting to avoid the conclusiveness of the federal determination, the California Supreme Court conjured up what it called an "obvious ambiguity." (App. A-1, p. A-7.) To find the "ambiguity" the California court pointed to the survey's denomination of an "inner bay" which the court, by 1951 dictionary definition of "bay," thought indicative of an "inlet of the sea." (*Id.*) Since the Land Office's determination was inconsistent with this definition, the court said that there was an "ambiguity." But concern as to the character of the "inner bay" was what caused the Land Office initially to remand the survey for examination of that very question. Its subsequent determination that the uncontradicted evidence established that the "inner bay" was "not an arm of the sea" is anything but ambiguous.

land to retroactively decree a major property interest in derogation of the title confirmed by the General Land Office violates this fundamental principle.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the California Supreme Court.

Respectfully submitted,

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